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**CONSTITUTIONAL FAITH AND DYNAMIC STABILITY:  
THOUGHTS ON RELIGION, CONSTITUTIONS, AND  
TRANSITIONS TO DEMOCRACY**

DAVID GRAY\*

To declare that religious and political authority have a tense relationship hardly deserves a sleepy blink. More than a few heads have rolled on both sides; the “problem” of religion is a ubiquitous, energetic, and often tiresome topic in both post-transitional constitutional movements<sup>1</sup> and among those who live under existing constitutions.<sup>2</sup> The frequent subtext in constitutional debates about religion is that constitutions should, on the whole, be secular documents, descriptive of secular institutions, and fundamentally protective of norms and practices susceptible to secular justification. The presumption is that constitutions could do just fine without religion. In fact, a purely secular society is, in some fashion, the utopian dream of the constitutional state and inheres in the very idea of constitutionalism as a solution to political questions of authority and legitimacy. Reciprocally, theocracies have their own answers to these questions, and have no need for a historical or profane foundation to justify claims of legitimacy or authority, though a worldly edifice by definition is required.

So, constitution does not need religion, and religion does not need constitution, and purely as a teleological matter, both imagine

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\* Assistant Professor of Law, University of Maryland School of Law. This Essay grows out of an extended project addressing jurisprudential issues core to transitional justice debates. See David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 LAW & CONTEMP. PROBS. 137 (2007); David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621 (2006); David Gray, *A No-Excuse Approach to Transitional Justice*, 87 WASH. U. L. REV. (forthcoming 2010); David C. Gray, *What’s So Special About Transitional Justice? Prolegomenon for an Excuse-Centered Approach to Transitional Justice*, 100 AM. SOC’Y INT’L L. PROC. 147 (2006). This Essay has benefitted from discussions with and encouragement from Mark Graber and Fred Gedicks.

1. See, e.g., J. BRYAN HEHIR ET AL., LIBERTY AND POWER: A DIALOGUE ON RELIGION AND U.S. FOREIGN POLICY IN AN UNJUST WORLD (2004) (discussing the role, if any, that religion plays in United States foreign policy).

2. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 850 (2005) (examining whether readily visible postings of the Ten Commandments in two Kentucky county courthouses violated the Establishment Clause of the First Amendment to the United States Constitution); *Van Orden v. Perry*, 545 U.S. 677, 681 (2005) (plurality opinion) (examining whether a monolith inscribed with the Ten Commandments located by the Texas State Capitol violated the Establishment Clause of the First Amendment).

the other as silt in the water that eventually will filter out. One can imagine hearing constitution, back from yet another interminable tête-à-tête with religion, sighing, “Oh for a world governed by science and reason, free from the weight and friction of ancient superstitions,” while religion, sequestered away in its own apartments, meditates on constitution’s incapacity to give itself to Truth as a matter of faith or, just for once, to suspend its demand for proof and inter-subjectively valid explanation. Add Art Carney and Walter Matthau, and you might have something.

While religion and constitution are an odd couple indeed, the fact is that they live together in some form everywhere constitutions are found. The explanation is hardly tenure-worthy. Constitutions, like all other human endeavors, are bounded by context<sup>3</sup> and it is hard to identify a cultural artifact more ubiquitous than religion. Every society has at least one religion, and, at this stage, almost every significant national border contains many.<sup>4</sup> Religion is not just everywhere, it has been around since long before recorded history and does not appear poised to exit the stage anytime soon. The religion “problem” for constitutions, then, is how to accommodate religion in a secular shell.<sup>5</sup> Rough and irresponsible ethnography provides some support for the broad thesis that the degree and form of accommodation is a function of religiosity and diversity. Peoples dominated by one religion tend to write constitutions that recognize an official state religion and, consistent with what Lon Fuller might call the “morality” of constitutions,<sup>6</sup> provide protections both for minority faiths and for the faithlessness. Iraq is a good example.<sup>7</sup> Less faithful peoples and

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3. See GEORG WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* 79, 103 (J. Sibree trans., Dover Publ’ns 1956) (1837) (arguing that, in contrast to the Universal Spirit, the spirit of a People and their forms of government are necessarily bound to context, including geography and history); JEAN-JACQUES ROUSSEAU, *Considerations on the Government of Poland (1772)*, in *POLITICAL WRITINGS* 159, 159, 162 (Frederick Watkins trans., Thomas Nelson & Sons 1953) (arguing that the form of a government must reflect the geographic and cultural landscape of its people).

4. See, e.g., IRAQ CONST. art. 2, 3, available at [http://www.uniraq.org/documents/iraqi\\_constitution.pdf](http://www.uniraq.org/documents/iraqi_constitution.pdf) (“Iraq is a country of multiple nationalities, religions, and sects.”).

5. See Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in *CITIZENSHIP IN DIVERSE SOCIETIES* 1, 1 (Will Kymlicka & Wayne Norman eds., 2000) (asserting that, with regard to multi-ethnic societies, political theory must address both the rights of ethnocultural minorities and the responsibilities of democratic citizenship).

6. See LON L. FULLER, *THE MORALITY OF LAW* 102–06 (rev. ed. 1969) (arguing that rule of law norms, such as the prohibition against ex post facto enforcement of law, are internal to the logic of the law itself).

7. IRAQ CONST. art. 2 (pronouncing Islam as the “official religion of the State” while “guarantee[ing] the Islamic identity of the majority of the Iraqi people and guarantee[ing]

those who confront a social world inhabited by several fairly equally well-represented religions tend to avoid establishment, but nevertheless guard jealously a place for religion in civil society protected by the state. The United States lies on this region of the spectrum.<sup>8</sup> Clinging on a bit farther down are nations like France, which seem poised to give up on religion altogether and appear increasingly dumbfounded by the faithful in their midst.<sup>9</sup> Painting with a broad brush, then, it seems that constitutions accommodate religion to the degree that they must, but largely plot a trajectory toward greater secularity in public life and, eventually, in private life. For its part, religion guards jealously its sphere of influence in civil society and often seeks to expand its footprint into public political life by, *inter alia*, placing believers in positions of authority,<sup>10</sup> affecting legislation, and sometimes changing constitutions to reflect faith-based beliefs.<sup>11</sup>

Assuming that these observations are true, I want to explore the possibility that constitutions should not merely accommodate religion where it is found and where it is too entrenched to move, but should encourage a flourishing diversity of religions as a mainstay of civil society. Communities of faith play an important role in maintaining in society what I will call “dynamic stability.” Looking at the question of constitution and religion through the lens of transitional societies, I suggest that emerging constitutional societies should not only secure a place for religion in society, but should take affirmative steps to expand the diversity of faiths represented in society. This last bit is crucial. While it is beyond the scope of this Essay to explore the issue extensively, the lessons of transitions ancient and current is that the association of state power with a single religion, and particularly any breed of fundamentalism, is terribly dangerous. Constitutions must,

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the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabaeans”).

8. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

9. See Molly Moore, *As Youth Riots Spread Across France, Muslim Groups Attempt to Intervene*, WASH. POST, Nov. 5, 2005, at A1 (describing the religious violence that erupted in Paris, France, in 2005).

10. See generally JEFF SHARLET, *THE FAMILY: THE SECRET FUNDAMENTALISM AT THE HEART OF AMERICAN POWER* (2008) (documenting the efforts of a secretive religious organization called “The Family” to recruit, place, and maintain associations with powerful political figures in the United States and abroad).

11. Religious organizations have, for example, played a prominent role in state constitutional debates about the status of same-sex marriage. See, e.g., Jim Carlton, *U.S. News: Gay Marriage in Peril in California*, WALL ST. J., Oct. 22, 2008, at A4 (explaining that the Utah-based Church of Latter-day Saints contributed “[b]etween 30% and 40% of the \$25.5 million in donations” raised to support Proposition 8, a state ballot measure to prohibit gay marriage in California).

then, take care. They ought generally to recognize and protect a role for religion in civil society. Constitutions must, however, avoid selecting among religions or allowing a single religion to achieve dominance as the definitive marker of national identity. I begin with a brief account of what I mean by “dynamic stability.”

## I. DYNAMIC STABILITY

I have argued elsewhere that much of the transitional justice literature misunderstands the challenges and misses significant theoretical and practical opportunities because it views transitional justice as a special case of “ordinary justice.”<sup>12</sup> In particular, it fails to take normative account of both the “justice gap”—the radical disparity between justice needs and the resources available to transitional regimes—and the underlying cause of that gap—the complex of cultural norms, social practices, institutional regimes, black letter law, official policies, institutional practices, social norms, cultural ideology, and historical teleology. Together, these elements provide the organizing ontology and justificatory ethic of abusive regimes and ratify, induce, and sustain programs of mass violence.<sup>13</sup> Of course, all societies, even stable states, are, to borrow from E. E. Evans-Pritchard, “segmented”—constituted of many smaller groups and associations which stand in opposition to competing groups and associations.<sup>14</sup> These divisions frequently reflect the same “bipolar logic”<sup>15</sup> that drives most abusive regimes—Nazi vs. Jew,<sup>16</sup> Hutu vs. Tutsi,<sup>17</sup> and so on. In addition, just as is the case in abusive regimes, in stable states, individuals are loci of contests between opposed groups. Groups compete for the loyalty of potential members or mark their borders by excluding some

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12. See, e.g., David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 *FORDHAM L. REV.* 2621, 2622–23 (2006) (arguing that the treatment of transitional justice as “ordinary justice” does not solve the obstacles to transitional justice). But see Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *HARV. L. REV.* 761, 765 (2004) (contending that the issues that arise in situations of transitional justice are “at most overblown versions of ordinary legal problems”).

13. Gray, *supra* note 12, at 2623–25.

14. E. E. EVANS-PRITCHARD, *THE NUER* 147–48 (1940); MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* 1–2, 8, 17 (1956).

15. See JAIME MALAMUD-GOTI, *GAME WITHOUT END* 83–89 (1996) (describing the bipolar logic that characterizes many abuse systems, as evidenced by the Argentinean military regime).

16. See DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS* 23 (1996) (arguing that the Holocaust was the expression of an “eliminationist” mode of anti-Semitism that had developed in Germany long before the Nazis assumed power).

17. See generally PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998) (describing the role of ethnic conflict between Hutus and Tutsis in the 1994 Rwandan genocide).

and including others. Members on each side look haughtily across the divide with a sense of entitled privilege, sure that they are naturally superior and confident that they are destined to prevail at the end of history. Yet, in stable states, these oppositions seldom if ever descend into violence, and certainly do not succumb to sustained and institutionalized violence. “Why” may seem a riddle; yet, the answer is both transparent and profound.

It is common and relatively intuitive to say that oppositions divide us. Be they economic, racial, religious, cultural, or ethnic, fundamental or silly and petty, we all regard each person around us as “other” in some way. In recognition of these divisions, many leaders implore us to set aside our differences and celebrate a universal essence that unites us in common above, beyond, and despite our differences.<sup>18</sup> While rhetorically seductive, such pursuits are not only folly; they are dangerous. This is because a robust multiplicity and variety of segmentary oppositional relationships allows societies to achieve and maintain stability.<sup>19</sup> That stability is by nature and necessity dynamic, rather than static; it is, however, by virtue of that dynamism, and not in spite of it, that societies are able to maintain stability. Societies that incorporate this dynamism into their cultural, political, and economic practices are supple and flexible in the face of internal and external challenges. By contrast, societies that reify a single identity and raise to preeminence a particular line of oppositional association are terrifyingly brittle, unstable, and poised on the precipice of disaster, awaiting only a trigger event to lead them into aggressive violence and chaos. Behind sweeping calls for unity lies the specter of a final solution.

Societies composed and recomposed by dynamic cross-sectional associations are far more stable than isolated groups or amorphous groups of unassociated individuals. Intra- and inter-group conflict is, of course, inevitable. In Evans-Pritchard’s terms, forces of fission constantly arise.<sup>20</sup> If individuals existed in one-dimensional social universes, there would be no hope of limiting conflict or restraining violence when fissures appear. However, individuals who exist at the nexus of numerous different lines of association inevitably find that self-interest and recognition are far more complex than might appear in the face of an immediate fission within or between groups. Thus,

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18. See, e.g., Barack Obama, *THE AUDACITY OF HOPE* 25 (2006) (urging citizens of the United States to remember that “despite all our differences . . . we share[ ] common hopes, common dreams, a bond that will not break”).

19. GLUCKMAN, *supra* note 14, at 17–18, 24.

20. EVANS-PRITCHARD, *supra* note 14, at 147–48; GLUCKMAN, *supra* note 14, at 8–9.

in a web of diverse and overlapping associations, forces of fusion drive competing members and groups together even as intersecting oppositions push them apart.<sup>21</sup>

In keeping with the concept of dynamism, different lines of association and opposition and linked forces of fusion and fission shift and change. They wax and wane, often in reaction to the source and nature of a conflict or threat.<sup>22</sup> To again adopt vocabulary from Evans-Pritchard, threats on the national level drive tribal groups together, suffusing inter-tribal conflicts.<sup>23</sup> Clan rivalries fade into the background in the face of inter-tribal conflict and group identities nearly disappear in the absence of an identity-activating opposition.<sup>24</sup> In a well-functioning and relatively stable society, however, these cross-sectional associations never disappear entirely. As a result, conflict, and more importantly violence, is controlled, regulated, and constrained.<sup>25</sup> Overall cohesion is preserved even in the face of apparently fundamental and intractable disagreements by offsetting forces of fission with forces of fusion imposed by commitments to multiple intersecting lines of association and opposition.<sup>26</sup>

Take the United States in the last election cycle as an example. As the rhetoric heated up in September and October of 2008, we were again subjected to the trope that the United States is fundamentally divided between Democrats and Republicans. While exaggerated, that picture is not entirely unrealistic. Were the bipolarity implied in the division between Blue and Red determinative of identity and as dominating as pundits would have it, the United States might be ripe for a politically driven genocide. Fortunately, it is not. One potential explanation for this is a persistent solidarity in faith to a higher level of association. We are all Americans first, and Democrats or Republicans second. That account begins to lose credibility, however, in face of the fact that, at its most powerful, the contest between Democrats and Republicans is precisely about what America is, or at least what it

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21. GLUCKMAN, *supra* note 14, at 24–26; *see also* POLITICAL ANTHROPOLOGY 8 (Marc J. Swartz, Victor W. Turner & Arthur Tuden eds., 1966) (describing the forces that act on political fields).

22. *See* EVANS-PRITCHARD, *supra* note 14, at 142–43 (describing the segments within Nuer tribes and their dynamics regarding conflict).

23. *Id.* at 142–43.

24. *Id.* at 147.

25. GLUCKMAN, *supra* note 14, at 8–9. Another controversial contributor to the ethnographic canon, Napoleon Chagnon, has made similar observations regarding the role that kinship and other political ties play in constraining forms of violence that may be used to express opposition. *See* NAPOLEON A. CHAGNON, YANOMAMÖ 160 (1968) (explaining that the Yanomamö avoid attacking villages with which they feast and trade).

26. EVANS-PRITCHARD, *supra* note 14, at 147–48; GLUCKMAN, *supra* note 14, at 24–26.

ought to be. Adherents to each of the parties are not particularly invested in living in the America of the other. In the midst of highly contested elections, rhetoric often trails off into discussion of “the real” America and wholly sincere suggestions that members of the other party are not “real” Americans at all.<sup>27</sup>

That even this most fundamental line of fusion—namely, that we are all Americans—is subject to fission is not, as it might seem, a reason for despair. To the contrary, it reveals the descriptive power of the account of social cohesion sketched here. Our society is divided and defined according to a wide variety of oppositions and associations, of which political affiliation is but one. We are divided by politics, yes, but also by race, gender, religion, sexuality, economic status, education, alma mater, and affiliations with sports teams. Yet, we stay together. We do so not out of faith to a meta-identity, but because each of these oppositions implies a reciprocal and complementary association. I might look in bewildered wonderment at my colleague who supports the other candidate in the upcoming election, sure that his views and party are destined for the dustbin of history, while at the same time recognizing him as a colleague, friend, and coach of my child’s little league team.

The resulting picture is an extensive system of overlapping Venn circles, locating for each of us a unique position in society. More importantly, however, the implied logic game of existential sufficiency reveals the dynamic stability achieved through those intersecting fields of association and opposition. Some Democrats are of African descent. Some African-Americans are Ravens fans. Some Ravens fans are Republicans. That web of inclusion and exclusion maintains relative stability and social tranquility by ensuring that whatever point of difference is highlighted at a particular time, pushing a society to segment, those who face each other across the divide are simultaneously drawn to each other, fused through collateral pathways of affiliation and identity.<sup>28</sup>

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27. *Cf.* THE FEDERALIST NO. 9, at 35 (Alexander Hamilton) (Terence Ball ed., 2003) (recognizing the core oppositions represented among the factions that populated the budding union).

28. Seeing this reveals the fundamental danger inherent in the political rhetoric of Vice-Presidential candidate Sarah Palin and Presidential candidate John McCain at the end of the 2008 election. Claims that then-candidate Obama was a mystery, an associate of terrorists, “not like us,” or not from the “real America” or “real Virginia,” proposed to deny him what Hannah Arendt has called his “specificity,” and to identify him with one dominant point of opposition. *See* Posting of David Gray to Concurring Opinions, [http://www.concurringopinions.com/archives/2009/01/mccainsage\\_of\\_s\\_1.html#more](http://www.concurringopinions.com/archives/2009/01/mccainsage_of_s_1.html#more) (Jan. 31, 2009, 18:55 EST). The insinuation of terrorist ties was particularly insidious because it marked a point of opposition far too powerful to be counterbalanced by any other associa-



James Madison observed the potential for diversification to maintain stability in Federalist No. 10.<sup>29</sup> There, picking up a theme developed by Hamilton in Federalist No. 9, Madison takes up the problem of factions. As exclusive and relatively small interest groups, factions represented to Hamilton a great threat to the stability of the union.<sup>30</sup> Madison was sympathetic to these concerns,<sup>31</sup> but took a radical tack on the solution. Madison recognized that factions are an inevitable outcome of freedom. Absent a tyrannical authority, human nature will always lead individuals to pursue their own interests, forming factions with those who are like-minded and who have similar interests.<sup>32</sup> Rather than seeing factions as dangers to the union, however, Madison saw the dangers of factions as perhaps the strongest argument for a large republic encompassing all of the individual states.<sup>33</sup> His insight was simply that factions will have a more difficult time forming dangerous single-minded majorities in a larger republic with a broader diversity and larger number of competing factions.<sup>34</sup> Moreover, the process of attempting to form a majority around any particular issue would force members of different factions to recognize and work with one another, a process that inevitably would dilute both orthodoxy and the ability of any faction to tyrannize others.<sup>35</sup>

There is, of course, much more that can be said about the details of dynamic stability and its role in preserving public order. For present purposes, however, it is enough to have this sketch in mind as prelude to a brief account of how regimes become abusive and how otherwise normal people, people just like us, become agents of genocide.

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tion. John McCain seemed to sense the danger in this trend when responding to an audience member at a rally who accused then-candidate Obama of being an “Arab.” Senator McCain emphasized that Obama is a father, a family man, and a loyal American, just like us, except a Democrat—an identity that should cause no citizen to fear him. *Id.* While Senator McCain was much criticized for this response, the discussion here makes clear that his instinct in the face of a proposed line of segmentation to emphasize collaterally shared associations was the correct one. *Id.* To simply correct the record by putting Barack Obama on the “non-Arab” side of the proposed line would have been to reify a line of segmentation between those of Arab descent and those not, deepening a line of social fracture with potentially violent possibilities.

29. THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 45.

30. *See* THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 27, at 35, 38.

31. *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 46 (acknowledging that “factious leaders may kindle a flame within their particular States”).

32. *Id.* at 41 (“The latent causes of faction are thus sown in the nature of man . . .”).

33. *See id.* at 40 (observing that a “well constructed Union [has the] tendency to break and control the violence of faction”).

34. *See id.* 45–46.

35. *See id.* at 46.

## II. LOSS OF DYNAMIC STABILITY AS PRELUDE TO VIOLENCE

What distinguishes abusive regimes from stable states is a catastrophic failure in this web of dynamic stability—a shift that normally is precipitated by crisis. In contrast with stable states, where there is a diversity of associations and oppositions, abusive regimes are dominated by one associational identity that occupies a central place across a number of economic, political, and social fields.<sup>36</sup> That dominance reifies a corollary line of opposition, and limits the ability of cross-cutting terms of association and identification to preserve broader, more inclusive, systems of social cohesion and to restrain violence. This pathological segmentation leads to a momentary lapse in the “general need for peace, and recognition of a moral order in which this peace can flourish,”<sup>37</sup> opening the door to violent realization of the mainstays of an abusive paradigm; a normative ontology and historical teleology endemic to whichever line of opposition (and, therefore, association) thus assumes a position of dominance.

This suppression of competing cross-group associations was a highlight, for example, in Nazi Germany. While the threads of an eliminationist anti-Semitism were already part of the social weave by 1933 when Adolf Hitler was elected Chancellor,<sup>38</sup> Aryans, Jews, Romani, and other non-Aryans had lived together in relative, if sometimes tense, peace, in part because other social, economic, and even family ties cross-cut the ethnic divide.<sup>39</sup> What drove the Holocaust was the totalizing emphasis on race and the association of Aryanism with nationalism, which unleashed, first in halting steps, and then in full sprint, the eliminationist energy inherent in anti-Semitism.

Similarly, while Rwanda in 1994 had a long history of ethnic tension between Hutus and Tutsis, conflict was controlled and violence was restrained by a host of deep lines of cross-cutting association. Hutus and Tutsis had intermarried for generations.<sup>40</sup> They attended the same schools and churches, engaged in commerce, and shared desks in the bureaucracy. In the spring of 1994, however, in the face of a perceived threat from Tutsi rebels in the North from Burundi, Rwandan Hutus were called to abandon their associations with Tutsis

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36. See Gray, *supra* note 12, at 2629–36 (describing abusive regimes and the abusive public face of law in these regimes).

37. GLUCKMAN, *supra* note 14, at 25.

38. GOLDHAGEN, *supra* note 16, at 87.

39. Cf. ERIC L. GOLDSTEIN, *THE PRICE OF WHITENESS: JEWS, RACE, AND AMERICAN IDENTITY* 14 (2006) (noting that the 1870s saw marriages of Jews and non-Jews in the United States occur on a “small but previously unheard of scale”).

40. GOUREVITCH, *supra* note 17, at 47–48.

who were their neighbors, co-workers, spouses, and friends and to show complete and exclusive allegiance to their ethnic group. As in Nazi Germany, national identity in Rwanda was collapsed into ethnic identity as the paradigm of Hutu Power, with its historical narrative and social ontology of ethnic supremacy, rose to dominance with catastrophic results.

### III. OSSIFICATION AND DYNAMISM: THE CONSTITUTIONAL PROMISE AND DANGER OF RELIGION

Given this brief account of dynamic stability, the ambiguous role of religion is clear. Religion can certainly occupy the definitive role in an abusive paradigm. Alternatively, religious associations, because they cross-sect numerous other lines of opposition, can provide a powerful force of fusion, constraining forces of fission exerted by overlapping oppositions of race, class, and politics. In this last section, I briefly explore this duality and suggest that writers and interpreters of constitutions should approach the problem of religion not as a demand for accommodation, but as an opportunity to sustain and extend dynamic stability. While a full investigation of the best constitutional form to accomplish that goal must wait, I suggest that the anti-establishment but pro-religion stance taken in the United States Constitution provides a promising model as compared to constitutions, such as Iraq's, that recognize an official state religion.

Religion, coupled with race and ethnicity, tops the charts as a source for abusive paradigms. It is at least nominally at the center of conflicts across the Middle East.<sup>41</sup> Religious difference also occupied a central place in the long battle over Irish independence.<sup>42</sup> Likewise, ethnically tinged religious opposition provided an ordering force in conflicts across the Balkans during the 1990s.<sup>43</sup> Reaching farther back, religion played a key role in justifying, even if not motivating, conflicts ranging from the Crusades<sup>44</sup> to colonialism.<sup>45</sup> Given this his-

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41. See, e.g., Edward Wong, *The Conflict in Iraq: Government; Top Iraq Shiites Pushing Religion in Constitution*, N.Y. TIMES, Feb. 6, 2005, §1, at 1 (explaining that, during the drafting of Iraq's constitution, religious Shiite parties in Iraq were pushing for Islam to be the guiding principle for the constitution).

42. See CLAIRE MITCHELL, *RELIGION, IDENTITY AND POLITICS IN NORTHERN IRELAND* 1-3 (2006) (discussing the prominent role that religion played in the Northern Ireland conflict).

43. See MICHAEL A. SELLS, *THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA* xiii-xiv (1998) (asserting that the national religious mythology of Serbia played a crucial role in the conflicts across the Balkans during the 1990s).

44. See MARCUS BULL, *Origins*, in *THE OXFORD HISTORY OF THE CRUSADES* 15, 29-34 (Jonathan Riley-Smith ed., 1999) (describing the role that religion played in recruitment, development, and enthusiasm during the Crusades).

tory, it is tempting to conclude that religion is a dangerous beast indeed, and in rare company for its ability to inspire and justify the targeted violence that is a hallmark of abusive regimes.

Stepping back to indulge in a bit of abstraction seems to confirm the case. Take, for example, the limitations of religion as a participant in public debates. Pressed to make its case for or against a particular policy, religion's views are quick to come up as question-begging. Almost by definition, religion's views on almost any matter proceed from a bedrock commitment to accept without external questioning an institution, doctrine, text, or personality's statement of the Truth. That foundation of assumed premises is quickly exposed in open dialogue and there is little more to say to those who do not share the commitment of faith that is the foundation of religious consciousness. Once this shallow bedrock has been reached, religion seems to be left with only two options if an independent secular ground for its views is not available—conversion or violence. Given this, it appears that any religion with public political aspirations is necessarily committed to a project of hegemony. All that remains is the question of means.

This, or something like it, is the particular danger of fundamentalism.<sup>45</sup> Again painting in broad strokes, fundamentalist strains of religious traditions distinguish themselves from more moderate forms of faith by rejecting even the possibility of fallibility while at the same time nurturing a belief in historical immediacy. This sets up a stark opposition not only between the faithful and the rest, but also between those of the true faith and those regarded as apostates.

Religion, then, and particularly in fundamentalist form, is committed to line-drawing. It defines the social world in stark terms. In addition, common narratives internal to religious faith, including notions of deific favor, salvation, and prophecies of the end times, provide a natural source for the normative ontology and historical teleology that frequently drive mass atrocities. Given even some of these points, the constitutional preference for secularism seems to gain some traction. While, as a purely practical matter, few constitutional movements can declare open hostility to religion, there seems to be a good case for setting a tone with constraint and then letting religion die a natural death.

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45. See DAVID CHIDESTER, *SAVAGE SYSTEMS: COLONIALISM AND COMPARATIVE RELIGION IN SOUTHERN AFRICA* 11–12 (1996) (explaining that the colonists often “assert[ed] that people had been found who lacked any religion”).

46. See JAMES BARR, *FUNDAMENTALISM* 9 (1977) (noting that the phenomenon of fundamentalism is a “fact of world religion”).

One reason to resist that temptation is the plain fact that the history of religion in the world is not all bad. Quite to the contrary, religion and religious figures are prominent in the Pantheon of peacemakers. From Gandhi to Martin Luther King, to Desmond Tutu<sup>47</sup> and Alex Boraine,<sup>48</sup> the world-historical religious figures with public legacies of peace are legion. More privately, religion is a common motivator for acts of charity and love too numerous to list. It seems, then, that the potential for religion, particularly religion properly channeled, to do this much good in the world is more than enough to make a case for creating and maintaining constitutional space for religion.

In closing this short Essay, I would like to suggest another reason that constitutions should both encourage and preserve a place for religion in civil society. That reason is straightforward in light of the above offered account of dynamic stability. While religion is naturally and by definition exclusive, religious communities are, for the same reason, also inclusive. Implied in the marking of some as other is the acceptance of others as self. Inclusion implies exclusion by definition, while opposition by necessity entails association. However, few religions by nature trace the boundaries of inclusion and exclusion in the faith along collateral lines of race, gender, class, or any number of other social markers. To the contrary, most religions invite membership from a broad spectrum of individuals across other exclusive communities, thereby providing an important source for cross-secting association. There are other sources of ecumenical association, of course, but religion is unique in at least one crucial respect. Ethnicity, race, gender, and, to a large extent, class, are birthrights. For the most part, religion is not. Quite to the contrary, most religions are in one fashion or another evangelical and grow, in part, by converting new members to the faith. As distinct from most other associations, then, religious groups hold out the unique potential to push against the tendency toward ossification and crisis posed by more inflexible institutions and affiliations, the memberships of which are existentially determined.

Religion, then, is an important player in the construction and maintenance of dynamic stability, though it, like many other sources

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47. *See generally* DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* (2000) (describing his experience as the Anglican Archbishop of Capetown and the Chairman of the Truth and Reconciliation Commission in South Africa).

48. *See generally* ALEX BORAINÉ, *A LIFE IN TRANSITION* (2008) (describing his life experiences, including his work as the deputy chair of South Africa's Truth and Reconciliation Commission and the President of the International Center for Transitional Justice).

of fission and fusion, carries the potential to destroy in its acts of construction. This suggests that any political society facing the architectural tasks at the fore in constitutional movements should reserve a central place for religion in its plans for future peace and stability. The form by definition will be unique to the circumstances and at any rate would require far more than can be accomplished in this short Essay. The framework for the discussion is easier to speculate about, however.

Religion has the potential to destroy by assuming a position of dominance in society and coupling its aspirations to state power. Religion also has the potential to limit the capacity of other exclusive communities to achieve dominance in society and pursue programs of oppression and targeted violence. The key to the problem of religion in constitutions is, then, to preserve space for religion in civil society while guarding against its hegemonic leanings and destructive potential. The results of this struggle are likely to look quite familiar. In particular, constitutions should protect religion explicitly and should be particularly keen on religious diversity. Constitutions should not establish or endorse a single religion, and constitutional authorities should avoid adopting religiously based truth claims as state policy in the absence of compelling secular justifications. This is hardly radical stuff, but this modest effort will have been worth the candle if the ideas outlined here provide more and perhaps different reasons to confirm and maintain the compromise reflected in our own and many other constitutions that address the problem of religion while also suggesting to constitutional movements in emerging states that they think carefully about the destabilizing potential of either recognizing an official state religion or mandating secularity in civil society.